D-0378 SUPREME COURT OF TEXAS CASES 002
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the system into constitutional compliance. However the court would not ignore even in the interim the most sharply disequalizing aspects of the relevant state act. Under those provisions, strikingly similar to aspects of the Texas system continued under S.B. 1, rich school districts continued to receive state aid thus undercutting the constitutional mandate of a "thorough and efficient system." The Court ruled therefore that, "[A]s a first step, certainly, the provision affording minimum support aid to each district regardless of wealth and the save harmless provision of the Bateman Act should yield to the state constitutional purpose." Id.

On appeal the New Jersey Supreme Court reflected the balance struck below by allowing an additional period of time for legislative action while ordering, as a provisional remedy, that minimum support aid and save-harmless funds could not be distributed under the unconstitutional school finance system. 339 A.2d 193, 201 (1975).

So too the California courts over the long history of the Serrano litigation struck a balance between allowing space for legislative action and the need for interim guidelines or standards to limit the perpetuation of inequality. In Serrano II the court found that the legislature had indeed passed measures following the original Serrano case which had improved the state's school finance structure. The court went on to note that: "The admitted improvements to the system which were brought by the Legislature following Serrano I have not been and will not in the foreseeable

future be sufficient to negate those features of the system which operate to perpetuate this inequity." The court stated that as an interim guideline the wealth related disparities between school districts in per-pupil expenditures, exclusive of the categorical special needs programs, should be reduced to less than $100 per pupil. Serrano v. Priest, 557 P.2d 929, 952 (Cal. 1976).

This Court's June 1, 1987 Judgement stated that "in the event the legislature enacts a constitutionally sufficient plan by September 1, 1989, this injunction is further stayed until September 1, 1990, in recognition that any modified funding system may require a period of time for implementation. This requirement that the modified system be in place by September 1, 1990 is not intended to require that said modified system be fully implemented by September 1, 1990." It was the opinion of this Court that a fully constitutional system had to be enacted into law but that the plan did not have to be completely implemented the first year. Senate Bill 1 does not enact a fully constitutional statute with later implementation. Senate Bill 1 does nothing more than set parameters for the 1990-91 year and leave the development of the plan for future years. Because the 1990-91 plan fails to meet the standards agreed to by the State itself, and because there is no plan for future years, Senate Bill 1 fails to meet this Court's order, as affirmed and modified by the Supreme Court.

The Plaintiffs request that this Court implement the Uribe/Luna plan for the 1991-92 school year with an option to the Legislature to implement by January 1, 1991 a plan of equal

student, expenditure, and fiscal equity. Specifically any plan passed by the Legislature must meet at least the following elements: (1) it must use all of the state's resources to support the state's plan not just the districts with 95% of students; (2) the plan must guarantee expenditure equality for 100% of students in the state and fiscal equality for districts in which 99% of the students reside, except for a transition period for debt service payment; (3) the plan must be fully based on full weighted students in order to assure that districts are not denied equal educational opportunity because of their greater costs; (4) the plan should include limitations on revenues generated by the wealthiest districts to within 5 of the state guaranteed program; (5) the plan should reward effort, but the minimum funding level must be at a high level, with some limited additional range to allow local flexibility, as long as that local flexibility is perfectly equalized within that system; (6) the Court should again allow the Legislature to come up with a substitute plan of the same high quality and high standards as the Court's plan, but to put the burden squarely on the state to show that their plan accomplishes the same standards as does the Uribe/Luna plan.

The Legislature's delay in passing a plan (June 6, 1990 instead of May 1, 1990), and the delay in the Court's hearing (July 9th instead of June 25, 1990), and the complexity of the record make it almost impossible to implement a constitutional plan at the beginning of the 1990-91 school year. On the other hand, the Plaintiffs do request that the Judgment of this Court implement a

plan for the second semester 1990-91 which will give each district the revenue to which they would be entitled either under Senate Bill 1 or under the Master's plan with the Senate Bill 1 monies, whichever is greater; and requires the Legislature to meet its constitutional requirement not to leave education to an "if funds are left over" basis, and to fund the difference between those amounts for any district which would obtain greater funding under the Master's plan.

VI.

THE COURT SHOULD GRANT THE PLAINTIFFS' EARLIER MOTIONS TO CLARIFY THE COURT'S JUNE 1, 1987 JUDGMENT

As stated in several briefs filed with the Court, the June 1, 1987 judgment does apply to local as well as state funds. However if the Court should decide that the June 1, 1987 judgment does not so apply, the Court should clarify that any injunction issued by the Court enjoining state funds under a constitutional plan, would apply to locally generated ad valorem tax funds as well as to state aid.

CONCLUSION

Based on the facts of the case, as outlined in Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and the complete record before this Court in this trial as well as in the 1987 trial, this Court should declare Senate Bill 1 unconstitutional, enjoin the use of Senate Bill 1, and order the implementation of a constitutional plan for the 1991-92 and future years and set out what that plan is.

The Plaintiffs who have suffered so long under the Texas school finance system have still not been able to live under a constitutional system and only firm action by this Court will guarantee their constitutional rights.

DATED: August 13, 1990

Respectfully submitted,

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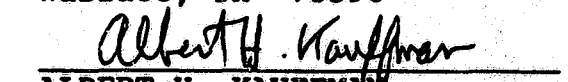

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EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.	§	IN THE DISTRICT COURT
	§	
VS.	§	TRAVIS COUNTY, TEXAS
	§	
WILLIAM N. KIRBY, TEXAS COMMISSIONER OF EDUCATION, ET AL.	§	250TH JUDICIAL DISTRICT
	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' FIRST POST-TRIAL SUBMISSION

Now come the Plaintiffs, Edgewood I.S.D., et al., who file this response to the State's first post-trial submission.

INTRODUCTION

The State's post-trial submission displays the weaknesses of both Senate Bill 1 and the State's efforts to defend it. The State seeks to use the presumption of constitutionality it should be afforded (but which Plaintiffs do not agree it should be afforded at this point in this litigation) to support a statute that does nothing more that set an unenforceable standard to be met by unknown funding and unknown elements of a future school finance system. Defendants have been unable to support their theories with testimony and have only been able to devise one scenario which would appear to meet their own "test" of statistical significance. The State has sought to defend its system by asking the Court to "trust" it, but as stated by a great poet, "words of love, so soft and tender, won't do it anymore," Mama Cass, The Mamas and the Papas, 1966.

I.

THE 95TH PERCENTILE AS A STANDARD

The State has argued that the "weakening" of the District Court standard of equity by the Supreme Court was a major issue informing the Legislature's design of Senate Bill 1. In fact the major issue before both committees and the Legislature was reducing costs and not tying the State into a system of long term increases in state funds to education. (See Exh. 1 to this brief; article on legislative history of Senate Bill 1) [1]

The State argues (Def. br. p. 3) the strict compliance options were abandoned after the Supreme Court decision. This is incorrect. The State Board of Education continued to consider such options, and bills were entered supporting the tax base consolidation concept which does create 100% expenditure equity and 99% fiscal equity.

Defendants also argue that Plaintiffs' experts have adopted the 95% standard. This is incorrect. Dr. Hooker and Mr. Foster supported a "real" 95% bill only as a matter of political reality in getting something out of the Texas Legislature, not as a standard which they supported as real school finance equity.

Unfortunately Senate Bill 1 does not even meet the 95th

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[1] The state has sought to bring in their own opinions though out of court statements on legislative history, the effects of expenditure equality in states like California, and other matters not in the record. Plaintiffs disagree with this approach; however if the Court should consider Defendants' arguments it should also consider the materials supplied by Plaintiffs which are entitled to at least as much deference by the Court.

percentile standard.

Allan Barnes did support a system of county tax base consolidation with equalization of local district enrichment at the statewide average wealth revenue per student. However it is clearly wrong to say that this guarantees equalization at only the 58th percentile of wealth. This plan consolidates the county tax bases, and therefore created much higher than the 58th percentile of wealth equalization standard. Using the standard that Defendant has applied to Mr. Barnes' system, the State's Senate Bill 1 would be at below the 70th percentile of wealth because it guarantees only $17.90 per weighted student in 1990-91 and does not consolidate tax bases giving it significantly lower percentage of wealth equalization.

Dr. Cardenas and Dr. Cortez supported the master's plan for only one year and with limitations on revenues. Those plans then would have created in excess of 89th percentile equity for the one year in which they would be in effect under Dr. Cardenas' and Dr. Cortez' suggestions.

Plaintiffs do not agree that revenue or expenditure limitations are a separate policy consideration from the issue of setting a standard to which to equalize (Def. br. p. 6). The State continues the analysis on which it lost Edgewood v. Kirby -- to look at different parts of the plan and their constitutionality without looking at the overall plans and overall effect on the school districts in Texas. This approach was rebuffed by the Texas Supreme Court.

Defendants again misstate the facts of the case. The State could equalize to the 100th percentile of wealth if it used a county tax base system or some consolidation; therefore the 171 billion dollar figure is inapplicable to the facts before this Court.

Defendants have attached to their brief the bill analysis on Senate Bill 1. That analysis states that the state cost for the next 5 years would be $4 billion for the five years, not the $6.2 billion which is the amount with fully funded elements. (See Bill Analysis, Senate Bill 1 by Sen. Parker, page 3) In other words those legislators who voted on Senate Bill 1 based on the reading of the bill analysis would do so based on their understanding that the bill would cost $4 billion over the next five years, not the $6.2 billion figure which would be necessary to fully fund the bill.

Senate Bill 1 does have more total funding than previous school finance plans; however the plan is a significantly smaller percentage increase than was House Bill 72, makes significantly fewer changes to the structure of school finance than did House Bill 72 or earlier school finance "reforms." The undisputed evidence is that Senate Bill 1 is not the greatest change or the greatest commitment of the state to school finance.

As a summary in section 1 the State tried to support Senate Bill 1 by saying that it was a reasonable and rational response. Plaintiffs deny that it was reasonable and rational. However, that is not the test set out in Edgewood v. Kirby. Senate Bill 1 is not

efficient. In addition, Senate Bill 1 does not meet the state's obligation to show a compelling interest in the system. Even if the state can somehow show a compelling state interest in the system, the Plaintiffs have shown less discriminatory alternatives exist.

II.

MEASUREMENT AND ANALYSIS OF EQUITY

Plaintiffs support a three year rather than a five year phase-in of any constitutional plan. However, there must be a plan not a promise of a promise. It was the intent of this Court's June 1, 1987 Judgment to have extant a definite plan for meeting the constitutional obligation with a verifiable phase-in system. Senate Bill 1 does not accomplish this.

The State argues that the policy statement in 16.001(b) of Senate Bill 1 is in line with the Edgewood case. It is correct that that policy statement is a quote from the Edgewood case, but it does not summarize the entire holding of the Edgewood case. Edgewood required an efficient system with equality and "substantially equal access to similar revenues at similar tax rates." Senate Bill 1 takes one statement from the decision -- admittedly an important statement -- and seeks to structure its entire finance plan around that statement without meeting the overall thrust of the Supreme Court decision.

The State's brief is inconsistent with Mr. Moak's testimony. Mr. Moak sought to distinguish §106.00(c)(1) from (c)(2). The State links these two sections and argues that "they define how

the state must measure and maintain the fiscal neutrality of the school finance system in all years beyond 1993-94." This admission by the state nullifies Mr. Moak's argument that the limitation on revenues in Section 16.001(c)(2) somehow does not immediately or directly affect the standard in 16.001(c)(1).

The federal wealth neutrality standard is based on 100% of districts not 95% of districts and therefore the reference to the federal standard of 85% is inapposite. We agree with the state that Dr. Jordan, the state's expert, for that matter anyone "may not of course predetermine where the foundation school fund budget committee would set an equity standard." (Def. br. p. 13)

Defendants argue that the state would be forced by experts like Dr. Jordan and property poor districts to maintain a high equity standard. This is excellent proof of Plaintiffs' argument that this bill does nothing more than continue the old system of increase and decrease in equity, putting the burden on poor districts to improve or change the system, than changing the system with some more funding and continuing the cycle.

Again the state seeks to relegate poor districts to the position of having to go before the Legislature, and now also go before an administrative agency under a substantial evidence rule, to try to get the state to adopt rules which might then lead to numbers which might than lead to more equity. (Def. br. p. 13)

The State argues that when large numbers of districts feel compelled to access higher revenues by raising taxes, the system would identify this group behavior and adjust. This is the state's

attorney's argument; however is not supported by any evidence in the case. The Defendants' experts have testified that there are no statistical tests which would be so sensitive or compelling as to unambiguously direct the state to change the system. In addition, even unambiguous statistics would not cause the system to adjust, but would only cause the policy makers to consider certain numbers before the policy makers decide whether to adjust the system.

The Defendants are correct that the Plaintiffs have not made a direct assault on the particular weights in Senate Bill 1. However, Plaintiffs strongly object to the provision in the bill that creates a system under which the weights would not be applied to the Guaranteed Tax Base Yield in the second tier; an action which would destroy whatever equity and adequacy Senate Bill 1 might produce. (Def. br. pgs. 15-16)

III.

THE FIVE YEAR PHASE IN PERIOD

The state is correct that if all state's assumptions and all state's promises are met (which Plaintiffs deny) that San Elizario will obtain additional funding during each of the next five years. However that increase will not even keep up with the increase of inflation after the first of those five years. Specifically, San Elizario will at its present tax rate receive $564 per student (not

per weighted students as Defendants stated) during 1990-91. [2] The increase for the latter four years of approximately $100 per year averages out to about 2.5% increase a year, significantly below the increasing cost of school districts which is going up at about 5% per year. Similarly the increase in North Forest per pupil revenue projected by the state will occur only if the state fully funds the program. [3] Although Richardson ISD might loose $200 per student funding by the 5th year of the plan, it can make up this $200 per student funding loss with a $.05 tax rate increase.

IV.

PRIORITY FUNDING - PRORATION

In this section the State has tried to rewrite the Supreme Court decision to stand for the proposition that the legislature "must adequately fund education at appropriate levels." (Def. br. at 22). This is simply not the standard in Edgewood v. Kirby which requires an efficient system and one with equality and equal rights for students.

Defendants have tried to create a structure in which somehow school districts are "guaranteed" the funding to which they would be entitled under Senate Bill 1 because of the relationship between the Legislative Budget Board, the Foundation School Program Fund

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[2] Of course this is based on the assumption that there is no proration necessary because of a general increase in tax rates by all districts. Nevertheless San Elizario would receive about $80 additional per student in 1991-92, $110 in 1992-93, $100 in 1993-94 and $100 in 1994-95.

[3] Recent projections place the increase in aid to North Forest and about $3 million rather than $4 million.

Budget Committee, etc. However, Defendants have stipulated that all of these projections can be changed by the Legislature even if recommended by the Legislative Education Board, the Foundation School Fund Budget Committee, and every statistician that has looked at the problem. In addition, though the Legislative Budget Board can use the standards of the Foundation School Fund Budget Committee in its projections, it is not required to do so.

Defendants general argument that one Legislature cannot bind future legislatures and therefore any school finance system must be "fluid" invites biennial court review of the school finance plan. That is why this court in the previous trial was so concerned about changing the system. Any system that is based on numbers set by the Legislature and local tax responses with lags in data and responses, would be subject to attack. Only a change in the structure of the way that the state raises local monies and disperses local monies will allow the Supreme Court to determine whether the Legislature has met its long term constitutional obligations. The state's scenario invites the Plaintiffs, in fact requires the Plaintiffs, to review the system every two years, determine whether they will go back to Court, and be involved in biennial efforts to force the Legislature to abide by the constitutional standards. In general, the Supreme Court did not say that the Legislature had to reserve funds for education which could later be moved to other parts of the budget any way the Legislature chooses. The Supreme Court said that the Legislature must spend the money and require districts to raise and spend money

in an overall efficient equitable system.

Defendants' counsel argued that the proration system means that no matter how much funding is available, the system would be equalized because the proration system would take care of the reduced state funding. This is incorrect. If the state's obligation is underfunded, for example, if in 1994-95 the Legislature funds a program at $1.2 billion additional funds (which the Senate Bill 1 bill analysis by Senator Parker said it will do), instead of the $2.2 billion a year (which the fiscal note says would be required at full utilization of the Senate Bill 1 system), there would be a $1 billion shortfall which would need to be prorated. This would require a $.20 local tax increase, according to the system outline by Defendants in their brief. (Def. br. p. 26)

This would then mean that districts would be required to tax at approximately a $1.38 to obtain the same overall yield of state and local revenues as originally available at $1.18. This would significantly reduce the revenue per penny tax rate guaranteed by the state. This would reduce the yield per penny per weighted student from around $30 yield per weighted student per penny tax rate ($3500 per weighted student divided by $1.18 tax rate) to about $25 yield per weighted student, with a corresponding decrease in the level of equity of the system.

Defendants' arguments that the equity of the system would be unaffected, or in fact increased, by the use of proration is incorrect under the state's own analysis of the determination of

equity of the ... stem.

V.

CHANGING THE SYSTEM

Defendants have sought to describe the Supreme Court decision as requiring what the state decided to do in Senate Bill 1 and then argue that Senate Bill 1 meets the Supreme Court language. We are not dealing with an empty record on the issue of the change of school finance system. The original trial of the case spent significant amounts of time talking about the weaknesses of the present system. The system described is one in which the Legislature sets the values for the numbers such as basic allotment, local share, guaranteed yield, etc. while allowing unequalized enrichment and no change in the way that local taxes are raised or used. This Court and the Supreme Court noted that the continuation of this system would lead to continued equalities and continued court battles; it is from this realization that the concept of the changing of tax bases arose in this case. The system was defined in the judgment as one that was based on a combination of state aid and local property taxes from districts of unequal tax wealth. The tax wealth in districts is surely the major part of the system that must be changed.

Possibly there are other changes that might meet the Supreme Court standards. However, Senate Bill 1 is not a change in the system. On the other hand the changing of tax bases, or placing limitations on district revenues combined with changing tax bases are in fact changes in the system. They would both create equality

and increase available funds for poor districts. This Court has found that district lines in Texas are irrational and that 600 to 700 million dollars a year was wasted under House Bill 72 (the figure is now almost $1 billion wasted in the present state system). These are the types of changes that need to be made to "change the system."

Defendants made much of a position of the majority of members of the Equity Center against county tax bases or limitations on expenditures. On the other hand, the Equity Center Board, without objection, passed a resolution stating that if their plan was not accepted "in toto" they would support the concepts of county tax bases and limitation on revenues. (Foster)

There is a distinction between "massive consolidation" and some limited consolidation. The Plaintiffs have proposed a system of county tax bases which would in effect create 254 tax bases instead of 1052. This could be considered a "massive change." In addition, Plaintiffs have supported the idea of some forced consolidation of tax haven districts, for example, the Santa Gertudis, Laureles, Juno and Allamoore districts. This would save significant funds each year and would remove the largest wealth per pupil districts from the system and effectively and efficiently use their tax bases. Defendants tried to put Plaintiffs in the position of recommending "massive consolidations." On the other hand, Defendants have created this system over a long period of time and allowed it to continue for a long period of time. Defendants now try to use the inefficient tax bases they created

as an excuse for continued inequality. Defendants have offered no real solution to the problem and no change in the system structure. Indeed, as testified to by all the witnesses, if we were dealing with districts of roughly equal tax bases, all of the issues around local-state sharing, limitations on revenues, tax base sharing, or "massive consolidations" would not be present in the debate.

VI.

REVENUE CAPS AS A POTENTIAL REMEDY

Plaintiffs do not agree with the Defendants that Edgewood v. Kirby opted for a "fiscal neutrality paradigm of school finance equity." Both decisions required efficiency and equality. Defendants argued that equal access to revenues for equal tax rates would be one way to achieve that standard of efficiency and equality. Both the District Court and the Supreme Court were distressed by the terrible inequities between the wealthiest districts with low tax rates and high expenditures and the poorest districts with high tax rates and low expenditures. It is this frustration that led to the general approval of the "substantially equal access to . . . " However the Supreme Court consistently mentioned that students in rich districts and students in poor districts should have equal rights, equal opportunity to education and consistently noted the link between efficiency and equality. Though the Supreme Court did speak in terms that can be considered "fiscal neutrality," it also spoke in terms that can be considered "pupil equality" or "expenditure equality." The Supreme Court did not hold however that Article VII §1 required fiscal equality and

ny plan that varies from fiscal equality is therefore unconstitutional. It was telling the Legislature that a constitutional plan must be efficient -- whether it meets the fiscal equality standards or the pupil equality standards or expenditure equality standards, and that the District Court would have to review the system under this combination of standards. The Uribe/Luna plan which produced 99.5% fiscal equality is certainly higher on this fiscal equality standard than Senate Bill 1 even proports to be. So, if Defendants are right, they still have not offered to the Court a plan which meets fair standards even for the same price.

The Defendants badly distort the record when they speak of the effects of revenue caps. When asked leading questions about the effects of caps in some other states, Defendants' experts commented that they were not experts on caps in those states, but after caps were set, certain states did not increase their level of revenues as quickly as they had previously. No causal connection was testified to and there is nothing in the record to support that. Now the Defendant seeks to bring in an article from the National Tax Journal (that was not in the record and whose author was not subject to cross examination) which seems to argue that the Serrano case caused proposition 13 (See Fischel Article). However that article in its own abstract stated that it is the minority opinion, i.e. "most people think that the tax revolt initiative was caused by excessive government expending and rising tax burdens on homeowners." The article offered by Defendants seems to argue that

since overall test scores have not gone up in California that equality was not worth it. (See Fischel Article, page 472). This is not the position taken by the Defendant Kirby or the State Board of Education in their proposals for funding or in their public speeches. In a lengthy book written by David Sears and Jack Atrin published by Harvard University Press, Sears and Atrin, Tax Revolt, Something For Nothing in California, Harvard University Press, 1985, the authors attribute the passage of proposition 13 to political mistakes by the California government and general concern on rising taxes, not the Serrano case. The authors described the history of proposition 13 and later failed efforts to limit spending and attributed these matters to general concerns about government efficiency and rising taxes rather than any equality requirement in Serrano. In fact in an entire chapter on the passage of proposition 13 entitled "Proposition 13: The Peculiar Election, the authors did not even mention Serrano. In their analysis of later efforts to further limit taxing and expenditures in California, they noted that these efforts failed summarizing that "without the earlier combination of an intense economic grievance, widespread opportunities for financial gain, and a symbolic protest [those matters which caused proposition 13] the tax revolts lost." Tax Revolt, supra at 206.

No matter how many times the state's attorney testified that "caps" would cause a reduction in over all expenditures, there is no reliable evidence to support that proposition and even an effort to bring in matters not in the record does not support the

proposition.

According to the National Center for Education Statistics, the per pupil expenditure in California remains far in excess of per pupil expenditure in Texas (California $4,392 -- Texas 3,717) in 1989-90. In addition, a recent Constitutional Amendment in California will pump additional billions of dollars into the public schools.

VII.

TAX BASE CONSOLIDATION

Defendants also seek to argue that the Uribe/Luna Bill would be unconstitutional because the Attorney General has written a letter [not an attorneys general's opinion] which said that an election in each county would be required to create the county tax base system. This letter, produced in one day after a request by Senator Parker, does not accurately depict the constitutional or case history of Texas.

A. Texas Constitutional Law and Case Law Support the Creation of County Wide Taxing Jurisdiction

School districts are creatures of the state.

> They [school districts] are state agencies, erected and employed for the purpose of administering the state's system of public schools... Generally it must be said that the Legislature may from time to time, at its discretion, abolish school districts or enlarge or diminish their boundaries, or increase or modify or abrogate their powers.

Love v. Dallas, 40 S.W. 2d 20, 26 (Tex. 1931).

The ownership of such property is in the hand of the local district or municipality for the benefit of the public, within the boundaries of the district or municipality. The Legislature may

control or dispose of the property without the consent of the local bodies, so long as it does not apply it in contravention of the trust. Love v. City of Dallas, 40 S.W. 2d at 27.

The Legislature has the authority to define or redefine school districts as part of its Constitutional authority under Article VII §1 and Article VII §3 of the Texas Constitution. In 1946 the Texas Supreme Court again interpreted Love v. Dallas as stated above. In North Common School District v. Live Oak County Board, 199 S.W. 2d 764 (Tex. 1946), the Supreme Court held that:

> generally the Legislature has authority to enlarge or consolidate school districts in such manner as it deems fit. [citing Love].

The cases most clearly on point to the creation of county wide taxing jurisdiction are the Edgewood v. Kirby case itself and Watson v. Sabine Royalty Corporation, 120 S.W. 2d 938 (Tex. Civ. App.- Texarkana 1938, writ ref'd). The Watson Court specifically upheld the creation of county wide equalization school districts noting that "the act had as its purpose to equalize the educational opportunities of school children." The county school district in the Watson case was established to "equalize" tax levies after oil was discovered in one part of the county. The Legislature's authority to do so was upheld specifically relying on Mumme v. Marrs, 40 S.W. 2d 31 (Tex. 1931), the companion case to Love v. Dallas. The Court in Mumme v. Marrs, held:

> the history of educational legislation in the state shows that the provisions of article VII, the educational article of the Constitution, have never been regarded as limitations by implication on the general power of the Legislature to pass laws upon the subject of education... the enumeration in the constitution of what the

> Legislature may or shall do in providing a system of education is not to be regarded as a limitation on the power of the Legislature to pass laws on the subject...

Mumme v. Marrs, 40 S.W. 2d 31, 33 (Tex. 1931).

Indeed the most important support for the idea of county-wide taxing authorities is the Edgewood v. Kirby decision itself. Edgewood concluded that Article VII §3 was "an effort to make schools more efficient and cannot be used as an excuse to avoid efficiency," Edgewood v. Kirby, 777 S.W. 2d at 397. Further the Edgewood case put the responsibility to provide for an efficient and equitable school system squarely on the Legislature stating that the Legislature could use school districts to meet the Legislature's obligations:

> Whether the Legislature acts directly or enlists local government to help meet its obligation, the end product must still be what the Constitution commands -- i.e. an efficient system of public free schools throughout the state.

Edgewood v. Kirby, 777 S.W. 2d at 398.

B. The Texas Constitution Istelf, Article VII, §3 Does Not Support The Allegation That Creation of Such County Districts Would Require Elections In Every County

Texas Constitution Article VII §3, and Texas Constitution, Article VII §3(b) do not require elections to create county taxing districts.

The Texas Supreme Court in Edgewood noted the primacy of Article VII §1 as the standard for school finance in Texas. Article VII §3 in effect allowed the Legislature a free hand at meeting the Legislature's obligations to fund public schools through the use of school districts. Article VII §3 is an

extremely complex section of the Texas Constitution. Article VII §3 states in pertinent part. . . :

> and the Legislature may also provide for the formation of school district [sic!] by general laws; and all such school districts may embrace parts of two or more counties, and the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public or schools of such districts,

Texas Constitution, Article VII §3 goes on to say:

> ...and the Legislature may authorize an additional ad valorem tax to be levied and collected within all school districts heretofore formed or hereafter formed, for the further maintenance of public free schools, and for the erection and equipment of schools buildings therein; provided that the majority of the qualified property tax paying voters of the district voting at an election to be held for that purpose shall vote such tax. . .

Thus, the Constitution allows the Legislature two ways to create school districts and to "pass laws for the assessment and collection of taxes" in said districts. Under the first clause no election is required. Under the second clause, county districts could be created though there is at least a question whether an election would be required.

The difference between the first clause and second clause of Article VII §3 is highlighted by a look at the history of Article VII §3. Specifically after the 1909 amendment to Article VII §3 the second clause was a separate sentence from the first clause. Specifically the second clause began:

> And the legislature may authorize an ad valorem tax ... (emphasis added) Article VII §3, 1909 amendment.

In later versions apparently to avoid starting a sentence with "and," or to somehow seek to unify Article VII §3, the different

sentence became a separate clause rather than a separate sentence. Nevertheless it is clear that the section which talked about authorizing "an additional ad valorem tax based on the vote of the people" was a separate concept from the allocation of the responsibility to the Legislature, "the Legislature shall be authorized to pass laws for the assessment and collection of taxes in all said districts and for the management and control of the public schools of such districts. . ."

This difference between the first and second clause of Article VII §3 supports the Legislature's authority to create taxing districts without the necessity of an election. Indeed the Legislature would have the authority to do this even if it were not to meet its overall obligation under Article VII §1 and the Edgewood v. Kirby decision. However, should the Legislature implement a county tax base system to meet its obligations under Article VII §1 and Edgewood v. Kirby, the authority of the Legislature to create such districts without an election would be clear.

Under Article VII §3(b) of the Constitution, passed in 1962, if there is a change in boundaries of a district:

> No tax for the maintenance of public free schools voted in any independent school district and no tax for the maintenance of a junior college voted by a junior college district, nor any bonds voted in any such districts, but unissued, shall be abrogated cancelled or invalidated by change of any kind in the boundaries thereof. After any change in boundaries, the governing body of any such district, without the necessity of an additional election, shall have the power to assess, levy and collect ad valorem taxes on all taxable property within the boundaries of the district as changed, . . . [emphasis added]

The amendment goes on to state the provisions under which such taxes will continue, without election.

Thus, to the extent that any ambiguity exists under the Legislature's power to create taxing authorities under Article VII §3 it is cleared up by the Texas Constitution Article VII §3(b) which allows the changes of boundaries of districts not to effect any existing taxes for maintenance or for buildings, and not to require an election.

Article VII §§1 & 3 viewed together give the Legislature the authority to create school districts at the county level for county-taxing purposes. It does not require a separate election in each county for the implementation of these taxes. Nevertheless, to the extent there is any ambiguity it is clarified by the intent of the people expressed in Article VII §3(b) to allow these sorts of changes without requiring additional votes to condone existing tax structures.

As a factual matter the record shows that the state would "save" approximately $80 million a year in Dallas county alone by going to the county wide taxing authority; similarly the state would save at least $250 million a year state wide by going to that system. (Cardenas, Cortez, PX 6)

In addition, the county tax base system creates an incredible increase in the overall equality of the school finance system as agreed to by Mr. Moak and as shown in Plaintiffs exhibits 29 and 30. (Cortez, Moak)

As argued by the state, the state does have a procedure for the management and implementation of county wide equalization taxes. Chapter 18, Texas Education Code. Therefore once the taxes are assessed under the county wide tax base system, the long term implementation, collection and disbursement of the tax monies could be done under existing state law. The state's efforts to cross examine Plaintiffs' witnesses about the particular administrative system of county tax bases was just a lawyer's game. In fact, once the tax bases are created the state law has already created the mechanism to enforce them.

VIII.

THE KENTUCKY AND NEW JERSEY SUPREME COURT CASES SUPPORT PLAINTIFFS CASE

Plaintiffs urge the Court to continue its previous finding that equal education opportunities are a fundamental right in Texas and that in the context of the school finance challenge poverty is a suspect category. Either of these holdings triggers the State's obligation to justify its school finance system by showing that there is a compelling state interest in the system. Even if the state can show such a compelling state interest, Plaintiffs prevail if they can show that there are less discriminatory alternative means of meeting the State's objective.

The position of the District Court in this case that education is a fundamental right has been supported in the Kentucky Supreme Court school finance decision, Rose v. Council for Better Education, 790 S.W. 2d 186, 206 (Ky. 1989). The Kentucky Supreme

Court noted that:

> This court, in defining efficiency must, at least in part, be guided by these clearly expressed purposes. [the purposes behind their education efficiency cause] The framers of Section 183 emphasize that education is essential to the welfare of the citizens of the commonwealth. By this animus (sic!) to section 183, we recognize that education is a fundamental right in Kentucky.

In Edgewood v. Kirby the Supreme Court noted the pre-eminence of education in the Texas Constitution, as did the Kentucky Supreme Court. On the other hand the Court in Edgewood did not specifically rule on the education as a fundamental right theory. The holdings in Edgewood looked at through the structure of the Kentucky Supreme Court decision supports this Court's finding of the fundamentality of education in Texas. The Kentucky Supreme Court defined an efficient system as one meeting the following characteristics:

"The essential, and minimal, characteristics of an "efficient" system of common schools, may be summarized as follows:

1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.

2) Common schools shall be free to all.

3) Common schools shall be available to all Kentucky children.

4) Common schools shall be substantially uniform throughout the state.

5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.

6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.

7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.

8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.

9) An adequate education is one which has as its goal the development of the seven capacities recited previously."

Rose, supra at 212-213.

Both the Kentucky case and the New Jersey case, Abbott by Abbott v. Burke, 575 A.2d 359 (N.J. 1990), dealt with the issue of local enrichment. The New Jersey Supreme Court had previously held that a efficient system could be supplemented by local enrichment. However, in Abbott by Abbott v. Burke they stated that the allowance of local enrichment could not be used as an excuse to avoid overall equality of the school finance system. The Abbott Court held that:

> The requirement of a thorough and efficient education to provide that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market, meant that poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students. The Act and its system of education has failed in that respect, and it is that failure that we address in this case.

Abbott by Abbott v. Burke, 575 A.2d 369, 372 (N.J. 1990).

The New Jersey system was a Guaranteed Yield System tied to a certain level just like Senate Bill 1. But the New Jersey

Supreme Court found that rich districts because of their ability to go above that minimum level and various minimum aid provisions (which were specifically declared unconstitutional in Abbott) the system did not work to create an efficient system over the period of years. Abbott, 575 A.2d at 408.

In Abbott, Defendant's relied on a series of statistical experts to analyze the school finance system showing the relationship between property values and expenditures. The Defendants' experts found that those relationships were not strong and did not show any causal relationship between property value and expenditures. The Plaintiffs based their statistics more on direct comparisons of rich and poor districts and comparisons of rich and poor districts based on their respective tax rates. The New Jersey Supreme Court credited Plaintiffs statistics. Nevertheless, the clear pattern that a group of statisticians using sophisticated statistical techniques can show no discrimination where a Supreme Court finds discrimination is one of the Plaintiffs' fears in this case. Indeed at the earlier trial of this case, several statisticians supported House Bill 72, now agreed to by all parties as unconstitutional, on the basis of the same sorts of sophisticated statistical techniques that are now being recommended by Defendants as the "guarantors" of long term equality in the school finance system.

The New Jersey Supreme Court, after a thorough review of its Guaranteed Tax Base System with average expenditures of $7,312, concluded:

The Act must be amended, or new legislation passed, so as to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts. "Assure" means that such funding cannot depend on the budgeting and taxing decisions of local school boards. Funding must be certain, every year. The level of funding must also be adequate to provide for the special educational needs of these poorer urban districts and address their extreme disadvantages.

IX.

ATTORNEYS' FEES

Plaintiffs claim attorneys' fees under the Declaratory Judgment Act and Tex. Civ. Prac. & Remedies Code §§104, 106. The state has waived all immunities from suit. These matters have been thoroughy briefied in Dec. 1989.

PRAYER

For the reasons stated in all the memoranda before the Court, this Court's 1987 findings and Judgment, Edgewood v. Kirby, we again request that the Court issue a temporary injunction changing the method of funding the public schools of Texas for the 1990-91 school year, and a permanent injunction enjoining Senate Bill 1 in 1991-92 and later years, as well as a permanent injunction implementing the Uribe/Luna plan with an option to the Legislature to come forward with a plan of equal equity in 1991-92 and later years.

DATED: August 24, 1990

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy by certified mail, return receipt request of the foregoing Plaintiffs' Response to Defendants' First Post-Trial Submission on this 24th day of August, 1990 to the following counsel of record:

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DIRECT APPEAL
ORIGINAL

D 0378

No. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

V.

WILLIAM N. KIRBY, ET AL.,

Respondents

PLAINTIFF-INTERVENORS' RESPONSE

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ATTORNEYS FOR PLAINTIFF-INTERVENORS
ALVARADO ISD, ET AL.

No. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

V.

WILLIAM N. KIRBY, ET AL.,

Respondents

PLAINTIFF-INTERVENORS' RESPONSE

COME NOW the Plaintiff-Intervenors Alvarado I.S.D., et al. and in keeping with the provisions of Rule 140, T.R.A.P., file their response to the Statement of Jurisdiction filed by the Plaintiffs and support their direct appeal to this Court. We agree that this Court has jurisdiction of the appeal and that jurisdiction should be exercised for the reasons set forth below.

STATEMENT OF THE CASE

This Court issued its mandate in this cause on November 13, 1989. The mandate provided "in accordance with the Court's opinion . . . the judgment of the trial court is modified, and as modified, is affirmed." That mandate, among other things, required that the Legislature enact a constitutionally sufficient funding system for public education in Texas. By affirming the trial court judgment,

this Court's mandate further required that the new funding "system be in place by September 1, 1990." Furthermore, by its mandate, this Court required that the Texas Legislature enact a constitutionally sufficient system of funding public education no later than May 1, 1990. As is evident from the trial court's judgment and opinion rendered on September 24, 1990, the Texas Legislature has failed to satisfy the terms of this Court's mandate in these respects, as well as others.

Following the issuance of this Court's mandate, the Plaintiff-Intervenors, as well as the Plaintiffs, filed new pleadings below, the Plaintiff-Intervenors filed an "Amended Petition for Supplemental Relief", a copy of which is attached to this response. Among the issues presented by our supplemental pleading was the claim that "the Supreme Court mandate . . . requires that the Legislature in setting appropriations "must establish priorities according to constitutional mandates . . . Senate Bill 1 ignores this explicit directive." The trial court has construed this portion of the Court's mandate to be "precatory" rather than mandatory. (Op. at 36).

In our Motion for Supplemental Relief, we further asserted that the mandate of this Court required "that districts must have substantially equal access to similar revenues per pupil at similar levels of tax efforts. Senate Bill 1 does not satisfy this constitutional mandate. . . ." We were successful in persuading the trial court that the Texas Legislature in Senate Bill 1 had

failed to satisfy this central requirement of the mandate in Edgewood v. Kirby.

All of this is simply to say that the core questions presented in this appeal are almost exclusively questions of construction and enforcement of this Court's earlier mandate.

The trial court has declared the legislative product, Senate Bill 1, to be unconstitutional because of its failure to satisfy the requirements of Article VII, Section 1 of the Texas Constitution, as construed by this Court in its earlier opinion in this cause. The trial court has modified in some measure the injunctive relief granted by this Court, it has granted additional injunctive relief against the State of Texas by mandating that the Texas Legislature enact a new school funding system to replace the defunct Senate Bill 1, and the trial court has denied specific requests for injunctive relief sought by Plaintiffs below.

JURISDICTIONAL STATEMENT

This Court assuredly has jurisdiction over this direct appeal and should exercise that jurisdiction because this case is "of such importance to the jurisprudence of the State that a direct appeal should be allowed." Rule 140(b).

This Court is given jurisdiction over direct appeals by virtue of the interaction of Article V, Section 3(b) of the Texas Constitution and Section 22.001 of the Texas Government Code. Amended Appellate Rule 140 implements the constitutional and statutory grant of jurisdiction. Furthermore, this appeal, of

necessity involves construction of this Court's earlier mandate, and it is settled law that only this Court has jurisdiction to construe and enforce its mandate. We discuss these two propositions below.

First, it is apparent that the only claims presented in this cause concern "the constitutionality of a statute of this State", to wit Senate Bill 1. There are no subsidiary issues, only the central constitutional question. As the Interpretative Commentary to Article III-b concludes: "Such direct appeal was authorized in order to permit the highest court in the State to pass immediately on the constitutionality of the statute involved . . . thus permitting a final determination more quickly on such a grave matter." Tex. Const. Art. V, §3 and 6, Interpretative Commentary (Vernon 1955). No matter could be more "grave" to the State of Texas than the funding of its public schools. Furthermore, this appeal concerns both the grant and denial of injunctive relief. As pointed out by the Edgewood Plaintiffs in their filings, they sought and were denied prayers for injunctive relief against the enforcement of this unconstitutional funding system. In addition, the State of Texas itself is now the subject of injunctive relief entered by the trial court which mandates that the State, through its Legislature, adopt and implement a modified system for funding public schools of Texas.

Second, quite apart from the foregoing jurisdictional grounds, this Court has exclusive jurisdiction to construe and enforce its own mandate, making a direct appeal to this Court the only feasible

avenue for securing review of trial court action. Conley v. Anderson, 164 S.W. 985 (Tex. 1913). As the Austin Court of Appeals expressed in dismissing an appeal in somewhat similar circumstances:

> The cases cited by appellant are all original proceedings in the Supreme Court and are illustrative of the law that only the Supreme Court has jurisdiction to construe and enforce its judgments and mandates. Appellant cites no authority that would give this Court such power.
>
> The Supreme Court has exclusive authority to construe and enforce its own judgment in this case; accordingly, the State's motion to dismiss is submitted and granted.

Bilbo Freight Lines, Inc. v. State of Texas, 645 S.W.2d 925, 927 (Tex.App.--Austin 1983, no writ).

CONCLUSION

The Plaintiff-Intervenors, Alvarado I.S.D., et al. respectfully urge the Court to assert jurisdiction over this matter and schedule it for plenary submission on the merits.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF-INTERVENORS
ALVARADO ISD, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff-Intervenors' Response has been sent on the 11 day of October, 1990, by United States Mail, postage prepaid to all counsel of record.

_____
DAVID R. RICHARDS

DIRECT APPEAL

D 0378

No. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

V.

WILLIAM N. KIRBY, ET AL.,

Respondents

SUPPLEMENT TO PLAINTIFF-INTERVENORS' RESPONSE

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ALVARADO ISD, ET AL.

No. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

V.

WILLIAM N. KIRBY, ET AL.,

Respondents

SUPPLEMENT TO PLAINTIFF-INTERVENORS' RESPONSE

COME NOW the Plaintiff-Intervenors Alvarado, ISD, et al. and supplement their response as follows:

In our original response we made reference to the "Amended Petition for Supplemental Relief" which we had filed in the trial court. We had intended to attach a copy of that pleading to our response. It was inadvertently omitted and we tender herewith a copy of that Supplemental pleading for the Court's inspection.

Respectfully submitted,

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ALVARADO ISD, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Supplement to Plaintiff-Intervenors' Response has been sent on the 18 day of October, 1990, by United States Mail, postage prepaid to all counsel of record.

_____
DAVID R. RICHARDS

No. 362,516

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL., Plaintiffs	§	IN THE DISTRICT COURT OF
ALVARADO INDEPENDENT SCHOOL DISTRICT, ET AL., Plaintiff-Intervenors	§	TRAVIS COUNTY, TEXAS
V.	§	
WILLIAM N. KIRBY, ET AL., Defendants	§	250th JUDICIAL DISTRICT

PLAINTIFF-INTERVENORS' AMENDED PETITION FOR SUPPLEMENTAL RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Alvarado Independent School District, et al., the Plaintiff-Intervenors in this cause, and pursuant to the provisions of Chapter 37 the Texas Civil Practice and Remedies Code petition the Court for further relief as set forth below.

I.

On June 1, 1987 a final judgment was rendered in this cause awarding to Plaintiff-Intervenors declaratory and injunctive relief. An appeal was taken and on October 2, 1989 the Texas Supreme Court affirmed the trial court's judgment in all material respects. The trial court judgment, as affirmed by the Texas Supreme Court, required that the Texas Legislature implement by no later than September 1, 1990 a constitutionally sufficient system of public school finance.

JUN 27

In June 1990 the Texas Legislature enacted Senate Bill 1, (71st Leg. 6th Call Sess.), purporting to respond to the constitutional mandate. This legislation will take effect on September 1, 1990. Senate Bill 1 does not provide funding beyond the current biennium.

II.

Senate Bill 1 fails to meet the requirements of the Texas Constitution as declared by this Court in its final judgment, and as that judgment was affirmed by the Texas Supreme Court. Accordingly, your Plaintiff-Intervenors seek further injunctive relief in keeping with the provisions of Section 37.011 of the Texas Civil Practice and Remedies Code and consistent with the original judgment herein whereby the Court "retains jurisdiction in this action to grant further relief whenever necessary or proper pursuant to Section 37.011."

III.

The final judgment of this Court as modified by the Texas Supreme Court, declared that the Texas Constitution requires "that each school district in this State has the same ability as every other district to obtain, by State legislative appropriation or by local taxation, or both, funds for educational expenditures, including facilities and equipment, such that each student, by and through his or her school district, would have substantially the same opportunity to educational funds as every other student in the State, limited only by discretion given local districts to set

local tax rates." The Texas Supreme Court declared that "districts must have substantially equal access to similar revenues per pupil at similar levels of tax efforts." Senate Bill 1 does not satisfy this constitutional mandate, nor does it even purport to do so. In this connection Senate Bill 1 makes no attempt to rectify the widely disparate property tax bases that are an integral part of the State's existing school districts or to compensate for such widely disparate property tax bases; Senate Bill 1 does not attempt to assure to Plaintiff-Intervenors substantially equal access to revenues available to the State's wealthier districts because it ignores the revenues available to the 300,000 students in the State's wealthiest districts; Senate Bill 1 does not attempt to ensure to Plaintiff-Intervenors substantially equal access to similar revenues per pupil at any level of tax effort which Plaintiff-Intervenor districts may choose to employ, but rather perpetuates a formula which purports to equalize only at predetermined levels of adequacy, and virtually caps the revenue levels for Plaintiff-Intervenors at such predetermined levels; Senate Bill 1 makes no attempt, or makes no meaningful attempt, to ensure equal access to facilities and equipment, and Senate Bill 1 continues to send significant State funds, including the proceeds of the Available School Fund, to wealthy districts, which can readily fund their school programs at minimal tax efforts. In sum, Senate Bill 1 is merely a

reinstitution of the funding scheme declared unconstitutional by this Court's earlier orders.

IV.

The Supreme Court mandate in this cause, as reflected by the opinion of that Court, requires that the Legislature in setting appropriations "must establish priorities according to constitutional mandates; equalizing educational opportunity cannot be relegated to an 'if funds are left over' bases." Senate Bill 1 ignores this explicit directive. Senate Bill 1 does not make the funding of the educational program mandatory or even a budgetary priority, Senate Bill 1 maintains proration formulas in anticipation of budgetary shortfalls and leaves the funding of education on the same footing as all other State programs, ignoring that funding of education is a constitutionally required priority. Furthermore, Senate Bill 1 does not even adequately fund the entitlements or the expectations which it creates by its own terms.

V.

This Court's earlier judgment as modified by the Texas Supreme Court, further declared that the Texas Constitution required that "each district has available, either through property wealth within its boundaries or State appropriations, substantially the same ability to raise and spend equal amounts per student after taking into consideration the legitimate cost differences in educating students." Senate Bill 1 not only fails to satisfy this mandate but constitutes a retrogression of the law as it existed at the

time of this Court's original judgment. At the time of this Court's original judgment, the then existing school finance system, provided for State funding to local district districts based upon a formula that took into consideration "the legitimate cost differences in educating students." This formula provided for funding differentials based upon such matters as the number of students in Special Education, Bilingual Programs, and recognized other elements of special needs. Senate Bill 1 permits the discarding in large measure of these funding formulas and thus no longer guarantees meaningful recognition of the "legitimate cost differences" as required by this Court's original judgment.

VI.

Senate Bill 1 contains a further retrogression of benefits for many of the Plaintiff-Intervenor school districts by instituting a new method of calculating the number of students in average daily attendance. The law as it existed at the time of this Court's original judgment, and as it has existed for some years, established a funding formula which determined State funding on attendance during a statutory sampling period. Senate Bill 1 has discarded the existing system and implements a funding formula based on daily attendance throughout the school year. This change in the funding formula will have severe adverse impact upon school districts which have high concentrations of minority and low income students. Such districts have higher drop-out levels and the formula will now curtail state aid to the very districts most in

need. Furthermore, districts in South Texas, with high concentrations of migrant labor families suffer an attendance decline in the last month of the school year, these districts too will suffer loss of State aid as a consequence. Senate Bill 1 not only fails to address the mandate of the Texas Supreme Court but it represents a loss in potential State revenue to many property poor school districts, including many of your Plaintiff-Intervenors.

VII.

For the reasons set forth above, Senate Bill 1 violates Article 7, Section 1 of the Texas Constitution and Article 1, Sections 3, 19 and 29 of the Texas Constitution as previously found by this Court in its original judgment. Your Plaintiff-Intervenors respectfully urge the Court to grant further declaratory relief, declaring Senate Bill 1 to be violative of the Texas Constitution and imposing appropriate injunctive relief against the State defendants. In connection with this prayer for injunctive relief, Plaintiff-Intervenors, because of the press of time and other considerations, do not request the Court to enjoin the implementation of Senate Bill 1 with respect to the school year which begins September 1, 1990.

WHEREFORE, PREMISES CONSIDERED, your Plaintiff-Intervenors respectfully request the Court to grant it appropriate declaratory and injunctive relief, award to Plaintiff-Intervenors their

attorneys' fees, interest thereon, and such other relief as may prove just and equitable.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF-INTERVENORS
ALVARADO ISD, ET AL.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Plaintiff-Intervenors' Amended Petition for Supplemental Relief has been sent on the 21 day of June, 1990, by United States Mail, postage prepaid to all counsel of record.

_____
DAVID R. RICHARDS

D 0378

DIRECT APPEAL

NO. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners

V.

WILLIAM N. KIRBY, ET AL.,

Respondents

RESPONSE OF DEFENDANT-INTERVENORS TO PLAINTIFFS-PETITIONERS' STATEMENT OF JURISDICTION AND DIRECT APPEAL

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October 18, 1990

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NO. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

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October 18, 1990

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NO. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners

V.

WILLIAM N. KIRBY, ET AL.,

Respondents

RESPONSE OF DEFENDANT-INTERVENORS TO PLAINTIFFS-PETITIONERS' STATEMENT OF JURISDICTION AND DIRECT APPEAL

NOW COME Defendant-Intervenors, Andrews I.S.D., et al., and in accordance with Rule 140(c) of the Texas Rules of Appellate Procedure, file this Response in opposition to Plaintiff-Petitioners' direct appeal to the Texas Supreme Court from a final judgment of the District Court of the 250th Judicial District, Travis County, Texas, filed and entered on September 24, 1990.

JURISDICTION

The Texas Rules of Appellate Procedure, as amended effective September 1, 1990, regarding Direct Appeals to the Supreme Court read in relevant part as follows:

Rule 140. Direct Appeals

(a) Application. This rule governs direct appeals to the Supreme Court authorized by the Constitution and by statute. The rules governing appeals to the courts of appeals apply to direct appeals to the Supreme Court except when inconsistent with statute or this rule.

(b) Jurisdiction. The Supreme Court may not take jurisdiction over a direct appeal from the decision of any court other than a district court or county court, or of any question of fact. The Supreme Court may decline to exercise jurisdiction over a direct appeal of an interlocutory order if the record is not adequately developed, or if its decision would be advisory, or if the case is not of such importance to the jurisprudence of the state that a direct appeal should be allowed. (Emphasis added.)

Because fact questions are integral to this direct appeal, the Supreme Court may not take jurisdiction under T.R.A.P. Rule 140(b).

ARGUMENT

The jurisdiction of the Texas Supreme Court on direct appeal is a limited one. Gardner v. Railroad Comm., 333 S.W.2d 585, 588 (Tex. 1960).

This direct appeal is in lieu of an appeal to the Court of Appeals, and must be upon questions of law only. If the case involves the determination of any contested issue of fact, the Court is without jurisdiction to consider the appeal. See Dodgen v. Depuglio, 209 S.W.2d 588, 592 (Tex. 1948). Even a combination of two complaints in one cause would not serve to

give the Supreme Court jurisdiction in a direct appeal of one of the complaints where otherwise jurisdiction would not attach. Halbouty v. Railroad Comm., 357 S.W.2d 364, 368 (Tex. 1962), cert. denied 83 S.Ct. 185, 371 U.S. 889.

In the field of constitutional law, no stronger presumption exists than that which favors the validity of a statute. Vernon v. State, 406 S.W.2d 236, 242 (C.C.A., Corpus Christi 1966; writ ref. n.r.e.). The burden rests on the individual who challenges the act to establish its unconstitutionality. In Re Johnson, 554 S.W.2d 775, 779 (C.C.A., Corpus Christi 1977; writ ref. n.r.e.). Every possible presumption obtains in favor of constitutionality of a statute until the contrary is shown beyond a reasonable doubt, and if a statute is susceptible of construction which would render it constitutional or unconstitutional, it is the court's duty to give it the construction that sustains its validity. Commissioners Court of Lubbock County v. Martin, 471 S.W.2d 100, 105 (C.C.A., Amarillo 1971; writ ref. n.r.e.).

The case at bar necessarily involved the presentation of evidence by the Plaintiffs and Plaintiff-Intervenors in an attempt to overcome this strong presumption of constitutionality. The Defendants countered with their own evidence. However, this lawsuit was filed and tried prematurely.

Senate Bill 1 is to be implemented over a five year period beginning September 1, 1990. Suit was filed on or about

June 27, 1990, long before Senate Bill 1 became effective on September 1, 1990. Trial of the case was held July 9-24, 1990, some five weeks prior to the bill's effective date. Significant data, including local school tax rates under the bill, was not available and could not be presented. Thus, the Court's Opinion is based on assumptions involving contested issues of fact not yet in existence. The trial judge's Opinion, which is also designated as the court's findings of fact and conclusions of law (Opinion, p. 1), states "Parts of Senate Bill 1 are destined to fail." (Opinion, p. 7.) (Emphasis added.) A court cannot presume that the act will be violated. Jenkins v. Autry, 256 S.W.2d 672, 674 (C.C.A., Amarillo 1923; writ dism'd.).

The Opinion further states:

> The question presented by the motions before the court is whether the Texas School Financing System as modified by Senate Bill 1 is efficient. The test for determining whether the financing system is efficient is whether it gives each school "substantially equal access to similar revenues per pupil at similar levels of tax effort." . . .
>
> In applying this test, the court presumed the financing system as modified by Senate Bill 1 to be constitutional until plaintiffs established otherwise. In other words, the court placed a heavy burden of persuasion on plaintiffs. In addition, the court attempted at each juncture to construe Senate Bill 1 so as to make the financing system constitutional. (Opinion, pp. 2-3).
>
> . . . .
>
> The question is whether Senate Bill 1 satisfies this test of equity. (Opinion, p. 6.)

The court did not separate findings of fact from conclusions of law in the 51 page Opinion. The contested questions of fact are therefore intertwined with the issues of law. The Plaintiffs' request for a direct appeal will necessarily include questions of fact. The Defendant-Intervenors, Andrews I.S.D., et al, have this date deposited cash in lieu of a Cost Bond for an appeal to the Third Court of Appeals in Austin. It would appear that an orderly disposition of this case would be to allow the Court of Appeals to consider this case first, and then to allow the Supreme Court to rule on the final issues of law.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant-Intervenors pray that this Court deny the direct appeal of Plaintiffs-Petitioners, and dismiss the said appeal.

Respectfully submitted,

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By: _____
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Attorneys for Defendant-Intervenors, Andrews I.S.D., et al

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing Response of Defendant-Intervenors to Plaintiff-Petitioners' Statement of Jurisdiction and Direct Appeal has been served on all attorneys of record, by certified mail, by depositing same, postage prepaid, in an official depository under the care and custody of the United States Postal Service on the 18th day of October, 1990, enclosed in wrappers properly addressed as follows:

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et al

Edgewood/Brief
EDGEWD

D 0378

NO. D-0378 DIRECT APPEAL

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

V.

WILLIAM N. KIRBY, ET AL.,

Respondents.

APPELLEES' REPLY TO APPELLANTS' STATEMENT OF JURISDICTION AND DIRECT APPEAL

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ATTORNEYS FOR APPELLEES/
DEFENDANT-INTERVENORS,
EANES I.S.D., ET AL.

NO. D-0378

IN THE

SUPREME COURT OF TEXAS

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

V.

WILLIAM N. KIRBY, ET AL.,

Respondents.

APPELLEES' REPLY TO APPELLANTS'
STATEMENT OF JURISDICTION AND DIRECT APPEAL

COME NOW APPELLEES HEREIN, DEFENDANT-INTERVENORS BELOW, EANES I.S.D., ET AL. and, in accordance with Texas Rule of Appellate Procedure 140, file this, their Reply to Appellees' Statement of Jurisdiction and Direct Appeal filed by the Appellants herein, Plaintiffs below, and supported by the Plaintiff-Intervenors below. Appellees/Defendant-Intervenors deny that the Supreme Court has jurisdiction of the appeal at this time and, in support thereof, would respectfully show the Supreme Court as follows:

SUPREME COURT LACKS JURISDICTION

The Supreme Court of Texas does not have jurisdiction over the above-referenced appeal at this time, as this direct appeal to the Supreme Court does not meet the constitutional or statutory requirements for a direct appeal to the Supreme Court.

Texas Constitution Article V § 3-b, as approved by the voters of Texas in 1940, states that,

> The legislature shall have the power to provide by law, for an appeal direct to the Supreme Court of this state from an order of any trial

> court granting or denying an interlocutory or permanent injunction on the grounds of the constitutionality or unconstitutionality of any statute of this state.... (Emphasis added.)

The Texas statute implementing the constitutional amendment is TEX. GOV. CODE ANN. § 22.001. Appellants rely on section (c) of that statute which states,

> An appeal may be taken directly to the Supreme Court from an order of a trial court granting or denying an interlocutory or permanent injunction on the ground of the consitutionality of a statute of this state. (Emphasis added.)

The jurisdiction of the Supreme Court on a direct appeal is dependent upon and limited to the wording of the constitutional amendment, Article V § 3-b, and the statute implementing same. Halbouty v. Railroad Commission of Texas, 357 S.W.2d 364 (Tex. 1962).

As recently amended, Rule 140 of the Texas Rules of Appellate Procedure no longer carries the statutory language found in TEX. GOV. CODE ANN. § 22.001. The rule as amended no longer speaks to the constitutional and statutory reasons upon which jurisdiction is based. Therefore, the constitutional provision and statutory language are controlling.

Obviously, the constitutional amendment and statute contemplate appeals where injunctions are denied because the trial court determined a statute was constitutional, or where injunctions are granted because the trial court determined a statute was unconstitutional. Neither is the case here. This is a case where the Appellants prevailed in the determination that the statute was unconstitutional, yet still want to directly appeal because they did not obtain their requested injunction.

As previously stated by the Supreme Court of Texas,

> For us to have jurisdiction of a direct appeal, it must appear that a question of the constitutionality of a Texas statute . . . was properly raised in a trial court, that such question was determined by the order of such court granting or denying an interlocutory or permanent

> injunction, and that the question is presented to this court for decision.

Bryson v. High Plains Underground Water Control District, 297 S.W.2d 117 (Tex. 1956).

As can be shown by this court's holding in Bryson, the Supreme Court lacks jurisdiction in this case for at least two reasons. First, the trial court's order denying the injunction was not grounded on the constitutionality of the statute and, second, the question of the constitutionality of the statute is not presented to this court for decision.

INJUNCTION ORDER NOT GROUNDED ON CONSTITUTIONALITY OF STATUTE

The trial court determined that the Texas system of public education financing as evidenced by Senate Bill I was unconstitutional. However, the trial court refused to grant an injunction based on that determination of unconstitutionality. The court's reason for denying the injunction was strictly for public policy reasons. As the court stated,

> To insure an orderly transition, districts must continue to operate. Regardless of the court's declaration of the unconstitutionality of the Texas school financing system, nothing in the court's judgment shall be construed as prohibiting the state or districts from taking any action authorized by statute or excusing them from taking any action required by statute. (Emphasis added.) (Final judgment at pages 3-4.)

As the court stated in its opinion, public policy reasons, not constitutionality, mandated the denial of an injunction. The court pointed out various reasons for refusing to grant the injunction, including the separa- tion of powers doctrine, Texas Constitution Article II § 1. In addition, the court noted that it is the duty of the legislature to establish and make suitable provisions for the efficient system of education, not the duty of the courts. The court also noted that, given the enormity of the task of establishing an efficient system of school finance, "Judicial patience with the efforts of its sister branches of government is required." (Opinion at pages 37-38.)

Finally, and most importantly, as the court stated,

> ...the court is also loath to act because its options are so unattractive. Cutting off all funds to force legislative action throws the process of education into chaos and it does damage to both students and teachers. Furthermore, cutting off funds imperils the credit of the state because of the contractual obligations of the districts. These problems can become severe quickly if a stubborn legislature or governor refuse to act.
>
> A judicially imposed remedy has its own problems. Courts are not designed to legislate or administer and cannot appropriate money. Any judicial remedy would, therefore, be less effective when implemented than a legislative solution. Undoubtedly, judicial action is far less desirable than legislative action. (Opinion at 38-39.)

Obviously, the court did not base its decision to deny the injunction on the grounds that the statute is unconstitutional or constitutional, as required by the Texas constitution and statute for a direct appeal. While admitting that the statute was unconstitutional, the court chose, however, in spite of such decision, to deny the injunction for purely public policy reasons, to avoid chaos and to continue to educate the children of the State of Texas.

CONSTITUTIONALITY OF STATUTE IS NOT PRESENTED FOR COURT'S DECISION

As also noted in the Bryson case cited above, the issue of the constitutionality of the statute must be presented to the Supreme Court on direct appeal. That issue is not presented by Appellants in this direct appeal. Rather, Appellants have prevailed in the issue regarding the constitutionality of the statute and do not bring that issue to the court for its consideration.

Appellants/Plaintiffs and Plaintiff-Intervenors cannot then be allowed to file a direct appeal to the Supreme Court in order to circumvent the appellate process rather than following the proper appellate route of allowing Appellees/Defendants and Defendant-Intervenors to appeal the trial court decision to the Court of Appeals. Defendants and Defendant-Intervenors should be

the Appellants, and should be allowed to appeal the constitutionality of the statute to the Court of Appeals.

Because the issue of the constitutionality of the statute is not presented to the Supreme Court at this time, this case is not ripe for a direct appeal to the Supreme Court. See Gibraltar Savings Association v. Falkner, 351 S.W.2d 534 (Tex. 1961).

SUPREME COURT MANDATE NOT RIPE FOR REVIEW

Plaintiff-Intervenors' reliance on Bilbo Freight Lines, Inc. v. Texas, 645 S.W.2d 925 (Tex. Civ. App.--Austin 1983, no writ) is ill-placed. First, the issue raised on direct appeal by Appellants/Plaintiffs is the trial court's refusal to grant an injunction. It was not the intent or mandate of the Texas Supreme Court in Edgewood v. Kirby, 777 S.W.2d 391 (Tex. 1989) to disrupt the educational process of all school children in Texas.

This court recognized, "...the enormity of the task now facing the legislature," and stated that it wanted, "...to avoid any sudden disruption in the education process...." Edgewood, at 399. (Emphasis added.)

The trial court did follow the Texas Supreme Court's mandate to avoid sudden disruption in the education of Texas school children when it denied the injunction request.

Plaintiff-Intervenors' reliance on Bilbo is also ill-placed because the Supreme Court's mandate must now be applied to different facts. The Texas Supreme Court acted as an impetus for change, it did not mandate any specific remedies. The first trial involved House Bill 72. The second trial involved Senate Bill I. Separate fact issues were raised by both. Because a new statute is being scrutinized, the Court of Appeals should be afforded its opportunity to determine questions of fact which necessarily will be before it.

CONCLUSION

In conclusion, Defendant-Intervenors, Appellees herein, assert that this Supreme Court does not have jurisdiction over the appeal at this time because the denial of the injunction by the trial court was not based on the constitutionality of the statute, the constitutionality of the statute has not been appealed to the Supreme Court by Appellants, and there is no Supreme Court mandate ripe for review.

Respectfully submitted,

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EANES I.S.D., ET AL.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Defendant-Intervenors' Reply has been sent on the 19th day of October, 1990, by United States Mail, postage prepaid to all counsel of record.

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D 0378

No. D-0378

* * * * * * * * *

IN THE

SUPREME COURT OF TEXAS

* * * * * * * * *

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, et al.,

Petitioners

V.

WILLIAM N. KIRBY, et al.,

Respondents

APPENDIX TO STATE DEFENDANTS' RESPONSE TO PLAINTIFF PETITIONERS' STATEMENT OF JURISDICTION AND DIRECT APPEAL

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I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, on this the 19th day of October, 1990 to all counsel of record.

Toni Hunter

TONI HUNTER
Assistant Attorney General

No. 362,516

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	IN THE DISTRICT COURT OF
Plaintiffs, and	§	
ALVARADO INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	
Plaintiff-Intervenors,	§	
V.	§	
WILLIAM N. KIRBY, ET AL.,	§	TRAVIS COUNTY, TEXAS
Defendants,	§	
ANDREWS I.S.D., ET AL.,	§	
Defendant-Intervenors, and	§	
ARLINGTON I.S.D., ET AL.,	§	
Defendant-Intervenors.	§	250TH JUDICIAL DISTRICT

REQUEST FOR ADDITIONAL AND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE F. SCOTT McCOWN, JUDGE PRESIDING:

COMES NOW, Defendants by and through their undersigned counsel and, pursuant to Rule 298 of the Texas Rules of Civil Procedure request the following Additional and Amended Findings of Fact and Conclusions of Law.

Request for Additional Findings

(1) Defendants' Exhibit J.1 p 2 accurately displays the distribution of state and local revenues for the 1988-89 school year, the last year of H.B. 72.

EXHIBIT 1

No. 362,516

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	IN THE DISTRICT COURT OF
Plaintiffs, and	§	
ALVARADO INDEPENDENT SCHOOL DISTRICT, ET AL.,	§	
Plaintiff-Intervenors,	§	
V.	§	
WILLIAM N. KIRBY, ET AL.,	§	TRAVIS COUNTY, TEXAS
Defendants,	§	
ANDREWS I.S.D., ET AL.,	§	
Defendant-Intervenors, and	§	
ARLINGTON I.S.D., ET AL.,	§	
Defendant-Intervenors.	§	250TH JUDICIAL DISTRICT

REQUEST FOR ADDITIONAL AND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE F. SCOTT McCOWN, JUDGE PRESIDING:

COMES NOW, Defendants by and through their undersigned counsel and, pursuant to Rule 298 of the Texas Rules of Civil Procedure request the following Additional and Amended Findings of Fact and Conclusions of Law.

Request for Additional Findings

(1) Defendants' Exhibit J.1 p 2 accurately displays the distribution of state and local revenues for the 1988-89 school year, the last year of H.B. 72.

(2) Defendants' Exhibit J.1 p 3 accurately displays what the distribution of state and local revenues for the 1990-91 school year would be under S.B. 1 if every district with a 1989-90 combined tax rate above $0.91 kept its combined tax rate the same in 1990-91 and every district with a combined tax rate below $0.91 raised its combined tax rate to $0.91.

(3) Defendants' Exhibit J.1 p 4 accurately displays what the distribution of state and local revenue for the 1994-95 school year would be under S.B. 1 if every district with a 1989-90 combined tax rate above $1.18 kept its combined tax rate the same in 1994-95 and every district with a combined tax rate below $1.18 raised its combined tax rate to $1.18.

(4) Defendants' Exhibit J.1 p 5 accurately displays what the distribution of state and local revenues for the 1994-95 school year would be under S.B. 1 if every district with a 1989-90 combined tax rate above $1.25 kept its combined tax rate the same in 1994-95 and every district with a combined tax rate below $1.25 raised its combined tax rate to $1.25.

(5) Defendants' Exhibit J.1 p 6 accurately displays what the distribution of state and local revenues for the 1994-95 school year would be under S.B. 1 if every district with a 1989-90 combined tax rate above $1.50 kept its tax rate the same in 1994-95 and every district with a combined tax rate below $1.50 raised its combined tax rate to $1.50.

Request for Amended Findings

(1) Page 10, par 2. Dr. Berne's testimony did not indicate that statistical analysis has no meaning. Dr.

Berne's testimony was to the effect that statistical analysis did not automatically set a standard, but that standards would be set by policy makers informed by statistical analysis.

(2) Page 10, par 2. The court states that ultimately the legislature will look at recommendations and decide...this strain of analysis runs through the opinion and illustrates a misstatement of the role of the Foundation School Fund Budget Committee that is inconsistent with statutory analysis and the evidence presented at trial. The Foundation School Fund Budget Committee operating under the authority of Tex. Educ. Code §16.256 does not make recommendations to the legislature. It by rule, under §16.256(d) determines the actual amounts of the funding elements set forth in §16.256(e). After these amounts are calculated, the amounts of money necessary to fund the elements are reported to the comptroller and reserved for the Foundation School Program in accordance with §16.256(b) the amount of money so reserved is not otherwise available for appropriation by the legislature. The legislature may not by appropriation change the funding elements promulgated by the Foundation School Fund Budget Committee. The legislature may of course by general statute do something else, but a legislature may always do so. This process is most emphatically <u>not</u> one of making recommendations to the legislature. Instead it describes a process by which the

legislature has delegated the responsibility of calculating the funding elements to an administrative agency.

(3) In its discussion of Continuation of Unequal Enrichment in Tier 3 at pp. 16-19 the court speculates upon facts not in evidence. The entire discussion is premised upon the notion that all districts will tax at rates substantially above the current guaranteed rate of $1.18 and the self correcting mechanism will not adjust the guaranteed rate. There is no legitimate evidence in this case as to what future aggregate taxing behavior will be. Such evidence would at this juncture be pure speculation. For the court to posit a hypothetical situation and then to assume that the system will not work as designed is to engage in a form of statutory analysis that is impermissible. The court is required to interpret a statute in a way to render it constitutional if possible. This court has reversed this cannon of interpretation and presumes that both the legislature and the Foundation School Fund Budget Committee will engage in future decisionmaking in an unconstitutional way. Such presumption is invalid. Defendants request the court amend its findings to reflect an analysis of the self correcting mechanism assuming that it will be employed.

(4) Cycles of Funding. The court finds at pp. 19-20 of its opinion that the funding cycle will be four years behind. This finding is contrary to the evidence. Defendants request that the court delete this finding and substituted the following finding. "The Foundation School Fund Budget

Committee is instructed to make calculations by November 1 of every even numbered year under Tex. Educ. Code §16.256(b). For example the Foundation School Fund Budget Committee will make calculations by November 1, 1990. By that time the aggregate tax rates for the 1990-91 school year will be known. The Foundation School Fund Budget Committee will also in the process also review projections of future tax effort by districts. At worst the funding cycle will be only two years behind, at best the projections as to future tax effort will be accurate and there will be no funding lag."

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent via U.S. Mail, certified, return receipt requested, on this the 4th day of October, 1990 to all counsel of record.

TONI HUNTER
Assistant Attorney General

State and Local Financing
House Bill 72

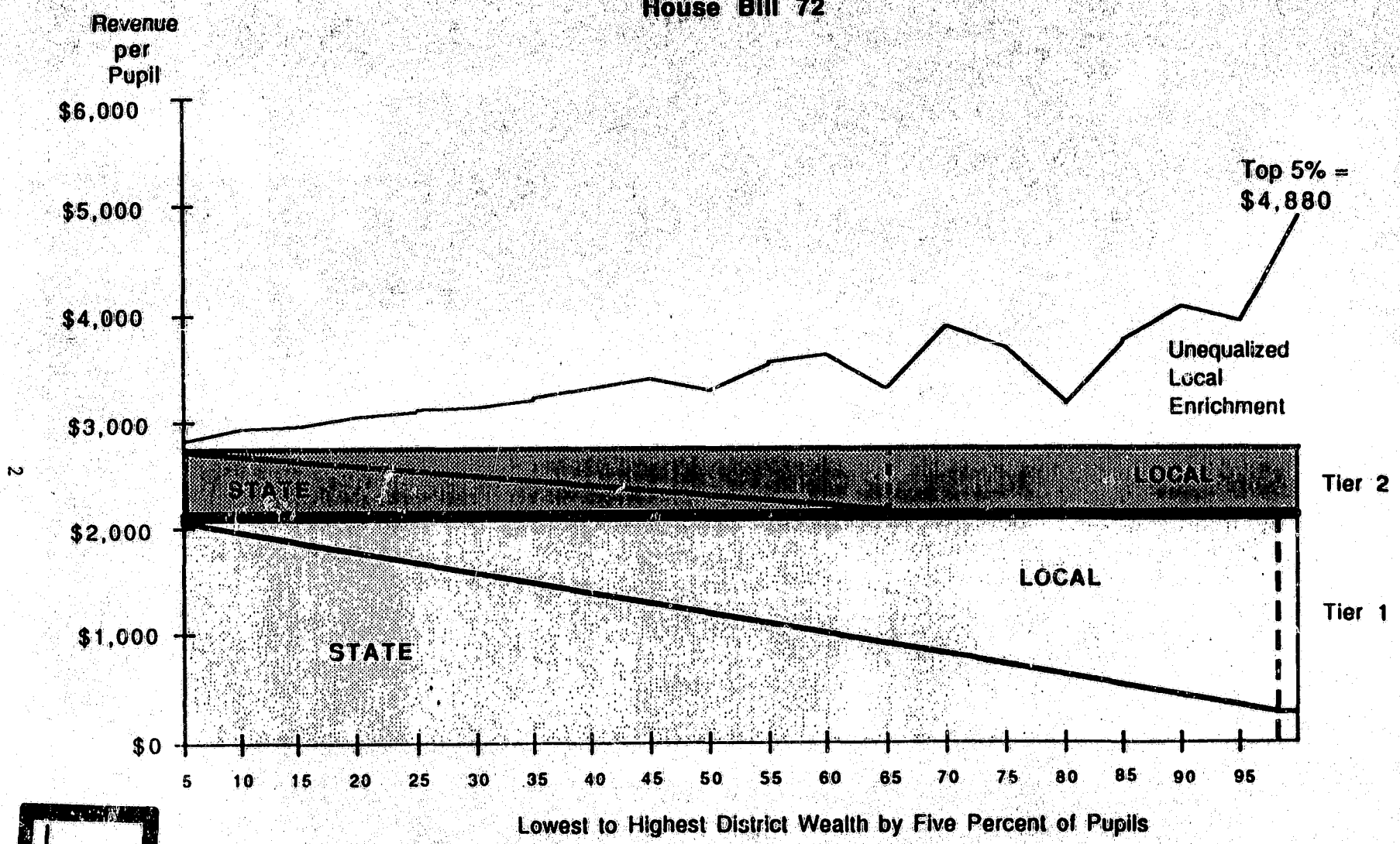
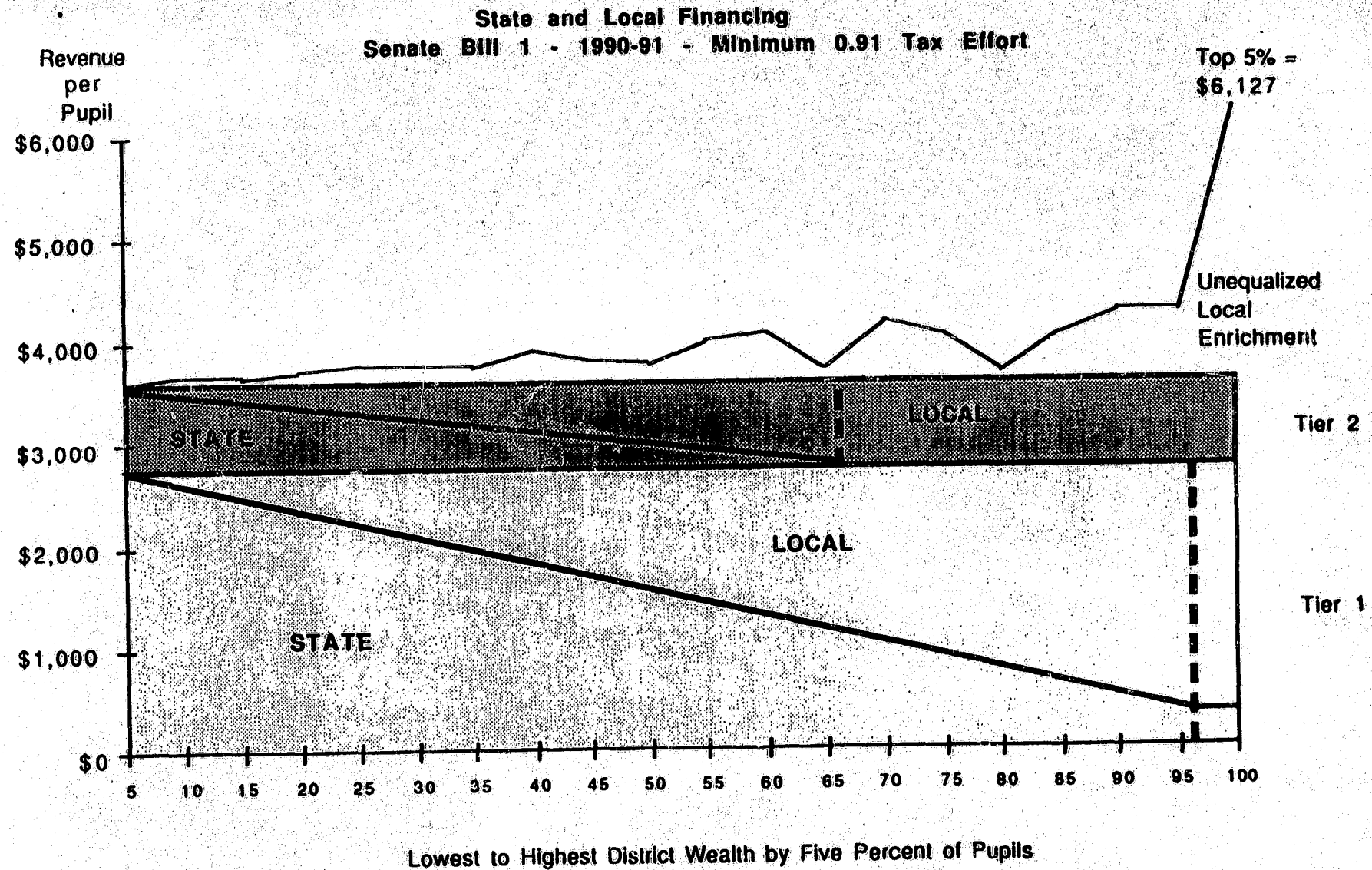
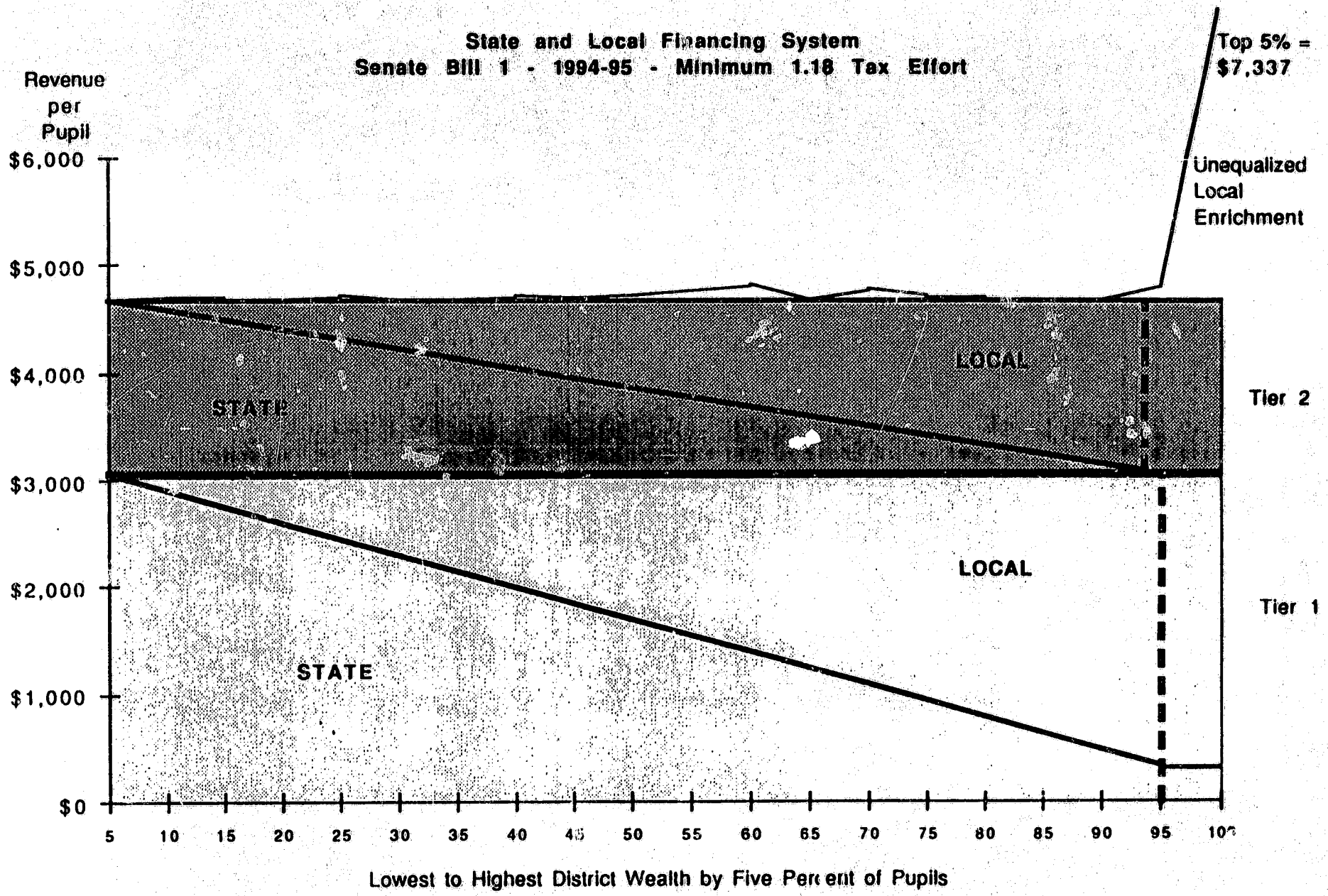
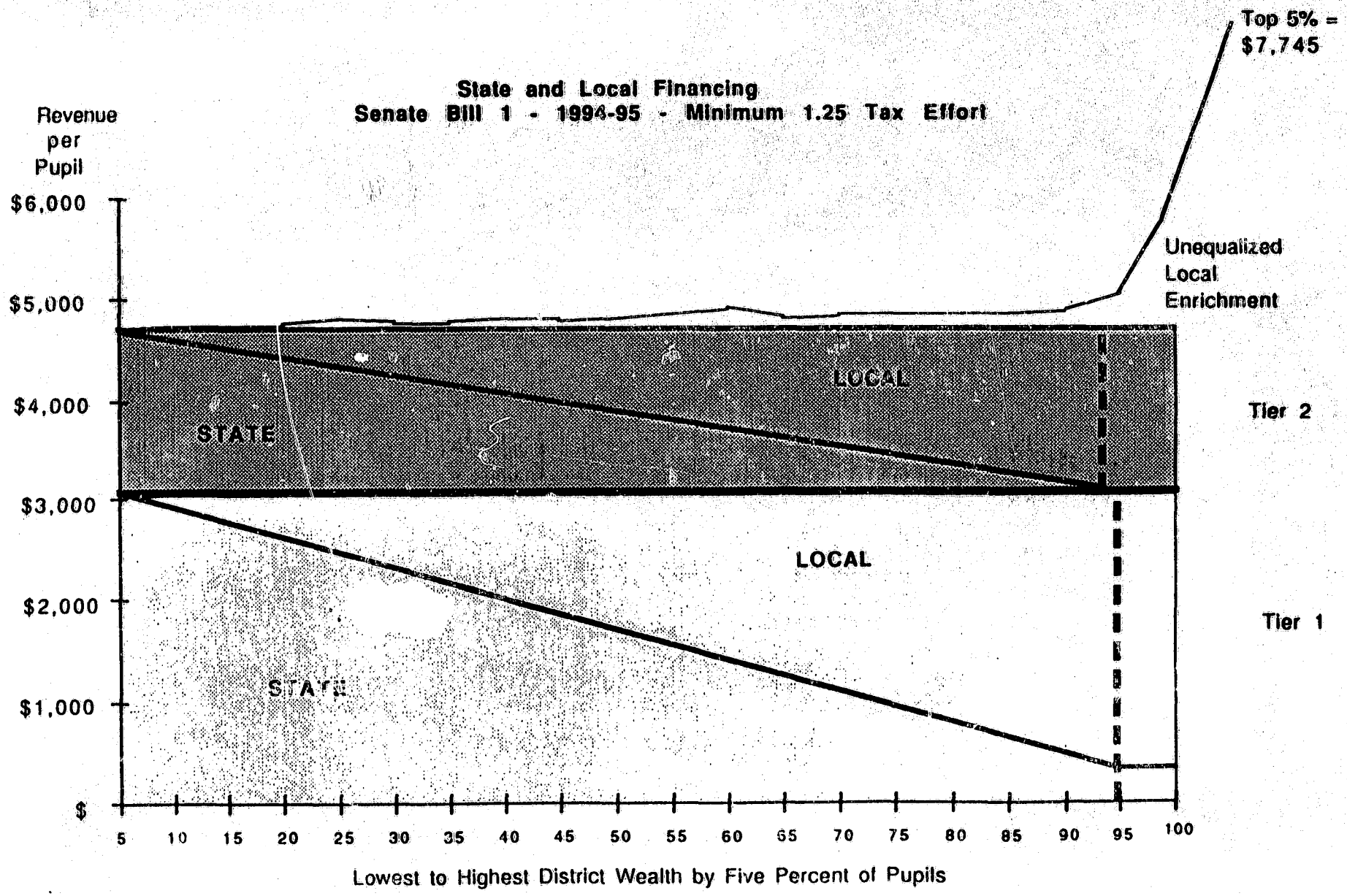
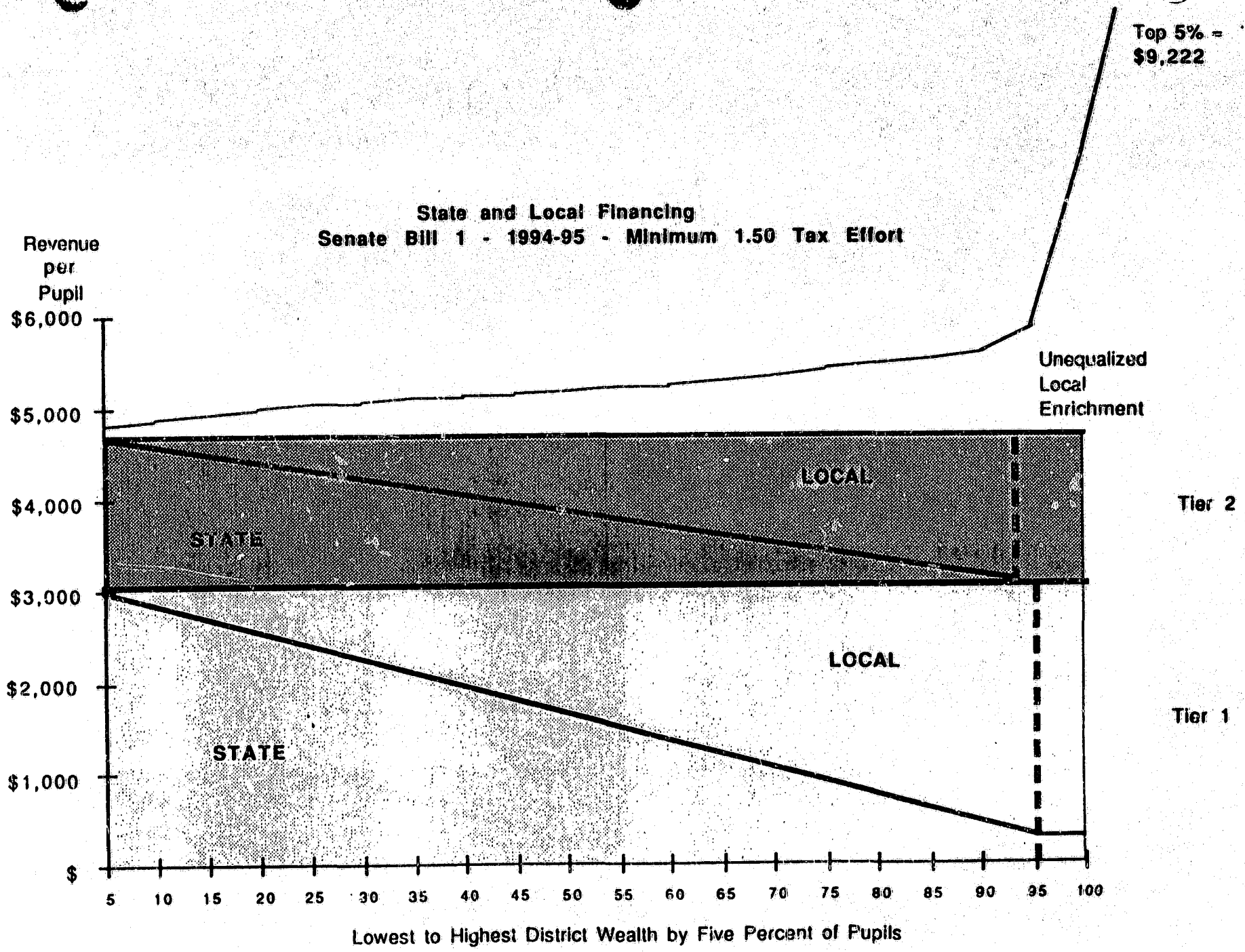


EXHIBIT ٢


State and Local Financing
Senate Bill 1 - 1990-91 - Minimum 0.91 Tax Effort
Revenue per Pupil
$6,000
$5,000
$4,000
$3,000
$2,000
$1,000
$0
Top 5% = $6,127
Unequalized Local Enrichment
STATE
LOCAL
Tier 2
LOCAL
STATE
Tier 1
5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
Lowest to Highest District Wealth by Five Percent of Pupils


State and Local Financing System
Senate Bill 1 - 1994-95 - Minimum 1.18 Tax Effort
Revenue per Pupil
$6,000
$5,000
$4,000
$3,000
$2,000
$1,000
$0
Top 5% = $7,337
Unequalized Local Enrichment
LOCAL
STATE
Tier 2
LOCAL
STATE
Tier 1
5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
Lowest to Highest District Wealth by Five Percent of Pupils


State and Local Financing
Senate Bill 1 - 1994-95 - Minimum 1.25 Tax Effort
Revenue per Pupil
$6,000
$5,000
$4,000
$3,000
$2,000
$1,000
$
Top 5% = $7,745
Unequalized Local Enrichment
LOCAL
STATE
Tier 2
LOCAL
STATE
Tier 1
5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
Lowest to Highest District Wealth by Five Percent of Pupils


State and Local Financing
Senate Bill 1 - 1994-95 - Minimum 1.50 Tax Effort
Revenue per Pupil
$6,000
$5,000
$4,000
$3,000
$2,000
$1,000
$
Top 5% = $9,222
Unequalized Local Enrichment
LOCAL
STATE
Tier 2
LOCAL
STATE
Tier 1
5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
Lowest to Highest District Wealth by Five Percent of Pupils

COPY

NO. 362,516

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, ET AL., Plaintiffs, and ALVARADO INDEPENDENT SCHOOL DISTRICT, ET AL., Plaintiff-Intervenors, V. WILLIAM N. KIRBY, ET AL., Defendants, ANDREWS I.S.D., ET AL, Defendant-Intervenors, and ARLINGTON I.S.D., ET AL. Defendant-Intervenors.	§	IN THE DISTRICT COURT OF TRAVIS COUNTY, T E X A S 250TH JUDICIAL DISTRICT

ADDITIONAL FINDINGS

These additional findings supplement the findings in the court's Opinion of September 24, 1990, and are made in response to the state's Request for Additional or Amended Findings of Fact and Conclusions of Law, filed October 4, 1990.

1. The state requests that the court find that the state's exhibit J.1 at pages 2-6 is accurate. The numbers are accurate given the assumptions. The court, however, does not find the assumptions to be probable. Indeed, the evidence showed the aggregate taxing behavior assumed by the state to be unlikely.

Oct 11 11 22 AM '90

2. The state asks the court to amend its finding that

EXHIBIT 3

Dr. Berne testified that "statistical analysis has no meaning." The court made no such finding. The court found that the term "statistically significant" has no meaning. Dr. Berne testified that, as used in Senate Bill 1, "statistically significant" is a meaningless term, undefined by statistics.

3. The state asks the court to amend its finding that the Foundation School Budget Committee merely makes recommendations to the Legislature. The state points to Education Code, § 16.256(b), which provides that before each regular session the Committee shall tell the Comptroller how much money to place in the Foundation School Fund for the upcoming biennium. The state asserts that "the amount of money so reserved is not otherwise available for appropriation by the Legislature." This assertion is simply untrue.

While it is true that the Foundation School Budget Committee does have the authority to order the Comptroller to place money in the Foundation School Fund for the upcoming biennium, whether the money is in fact appropriated to that fund is decided by the Legislature through the regular appropriation process. Government Code, § 322.008(b) provides that the general appropriations bill prepared by the Legislative Budget Board shall include "<u>for purposes of information</u>" the dollars determined by the funding elements of the Foundation School Budget Committee. How may of those

dollars are appropriated to the Foundation School Fund is decided by the Legislature in the general appropriations bill.

The state asks the court to find that the Legislature "has delegated the responsibility of calculating the funding elements to an administrative agency," the Foundation School Budget Committee. The state wants the Committee recognized as an administrative agency because it is then subject to judicial review. As previously noted, however, judicial review is pointless. The work of the Foundation School Budget Committee is only a recommendation to the Legislature. Judicial review therefore would be only advisory. Judicial review of any recommendation would also be too slow to be of any use. Even timely judicial review would be of no use because judicial review is limited to the question whether there is substantial evidence to support the rule an agency is charged by law to develop. Substantial evidence review is extremely limited. Only some evidence is needed to support an agency's decision. But the most critical point remains that by law the Foundation School Budget Committee is charged with "equalizing" up to a level of "adequacy." Even timely and rigorous judicial review therefore could not ensure substantially equal access to similar revenues per pupil at similar revenues per pupil at similar levels of tax effort.

3. The state argues that the court cannot find that

districts will use tier 3 and must assume that if they do the "self-correcting" mechanism will be employed. The state seems to be saying that the court cannot act on probabilities established by the preponderance of the evidence. The court rejects this position. The entire point of this case is that the state must organize itself so that equity is likely rather than unlikely. The state has not done that.

Based upon the evidence, the court has found it highly probably that districts will use tier 3. The court has explained why in detail. Senate Bill 1 does not require the Legislature to equalize opportunity for districts with no access to tier 3. There is no "self-correcting" mechanism.

4. The state asks the court to find that the equity funding cycle will be only two years behind, rather than four. Given that the Legislature meets in regular session every other year, and budgets for two years, there is no way to be only two years behind.

In summary, the court stands by its findings.

SIGNED this 11th day of October, 1990.

F. Scott McCown

F. SCOTT McCOWN
Judge Presiding

D 0378

No. C-0378

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IN THE

SUPREME COURT OF TEXAS

****

EDGEWOOD INDEPENDENT SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

WILLIAM N. KIRBY, *et al.*,

Respondents.

STATE APPELLEES-DEFENDANTS' RESPONSE TO APPELLANTS-PLAINTIFFS' STATEMENT OF JURISDICTION

Pursuant to Rule 140(c) of the Texas Rules of Appellate Procedure, the State Appellees-Defendants ("State") respond to the Statement of Jurisdiction filed by the Appellants-Plaintiffs ("Plaintiffs"):

POSTURE OF THE CASE

On October 9, 1990, the Plaintiffs filed a Notice of Appeal and cost bond with the 250th District Court of Travis County and a Statement of Jurisdiction and Direct Appeal to this Court. Pending at the time were the State's Request for Additional and Amended Findings of Fact and Conclusions of Law, filed on October 4, 1990. The district court ruled on the State's request on October 11, 1990.

The Plaintiffs premise jurisdiction on Article V, §3(b) of the Texas Constitution and §22.001(c) of the Texas Government Code. In a response, the Plaintiff-Intervenors posit another jurisdictional basis for this Court's taking and deciding the Plaintiffs' appeal. The Plaintiff-Intervenors argue that the assertion of jurisdiction is appropriate pursuant to the Court's authority to construe and enforce its earlier mandate in the case.

It is not immediately apparent whether the consequences of jurisdiction under the two posited routes are identical. The direct appeal route guided by Rule 140, T.R.A.P., does not permit the Court to assert jurisdiction over any aspects of the case involving "question[s] of fact." The mandate enforcement route is less clearly delineated, although constitutional indications are that Supreme Court resolution of factual disputes also are precluded when this route is taken. TEX. CONST. art. V, §3-b. Regardless of the jurisdictional route, one thing must be clear when and if the Court asserts jurisdiction: the record made below on the constitutionality of S.B. 1 must be brought forward to the Court.

WHETHER JURISDICTION SHOULD BE ASSERTED NOW

The issues presented by this litigation are of crucial importance to this State and its future. They will not be finally decided until decided by this Court. A delay in the decision serves no one -- not the legislature, not the students, not educational policy makers, and not the general public. The sooner the Court decides the critical issues, including both those regarding injunctive relief raised by the Plaintiffs and those which the State anticipates raising in a cross-appeal challenging the district court's determination that S.B. 1 does not

satisfy this Court's earlier mandate, the better for the State. Therefore, the State not only does not oppose the Court's assertion of jurisdiction; it urges the Court to do so.

ADDRESSING ANY FACTUAL DISPUTES

That factual disputes arguably outside the Court's jurisdictional domain will arise in the event jurisdiction is asserted now over the Plaintiff's appeal or later over the State's cross-appeal is virtually certain. The Court, however, need not anticipate that issue at this point. The Court has the tools at hand to deal with any factual disputes that do arise which are relevant to the issues as framed by the parties and deemed legally material by the Court.* The Court may determine, for example (in the course of reviewing the record which the State earlier has noted must be brought up with the case), that the district court evaluated the evidence in light of an incorrect legal standard and remand the case to the district court for determination of certain facts in light of the correct legal standard as explicated by the Court. Further, it is important to note that Rule 140(b)'s exclusion of factual questions from the Court's direct appeal jurisdiction does not preclude their ever being addressed once the Court accepts such jurisdiction. The Court may determine so much of the case as is

* In its findings, the district court grants that "the efficiency of Senate Bill 1 must be measured against the alternatives" and acknowledges some force in the State's argument that ". . . the alternatives . . . are either more undesirable, politically unacceptable, or themselves unconstitutional." Order at 24. Yet, the district court found, "beyond that, if an equalization plan without caps is the only solution, Senate Bill 1 is not an acceptable version." Order at 27. It later further found that the legislative assumptions about S.B. 1 and its equalizing potential were "improbable."

In its anticipated cross-appeal in defense of S.B. 1's constitutionality, the State likely will argue that the district court assessed these factual issues through a faulty legal prism. Regardless of whether the Court ultimately adopts the State's view on this point, it may decide that the underlying factual issues need further elucidation. The text explains how the Court may both assert jurisdiction *and* obtain whatever further factual elucidation is needed.

within its jurisdiction, highlight factual disputes whose resolution is necessary to concluding the case, and remand the case to either the district court or possibly the intermediate appeals court for the resolution of the remaining factual issues, again within the legal guidance provided by the Court.

CONCLUSION

The State urges the Court to assert jurisdiction over the case and resolve the questions of law it and the anticipated State cross-appeal raise. Any relevant factual disputes which arise while the case is before the Court ultimately may be remanded, with guidance, to the lower courts for resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been sent by United States mail, certified, return receipt requested, on this 19th day of October, 1990, to each counsel of record.

MARY F. KELLER